No. 13,602

United States Court of Appeals

For the Ninth Circuit

JAMES V. McCONNELL and
MARGOT MURPHY McCONNELL,
Appellants,

vs.

PICKERING LUMBER CORPORATION,
Appellee.

APPELLANTS' CLOSING BRIEF.

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INTRODUCTION.

Appellee concedes (p. 1) that statements in our opening brief with respect to the jurisdiction of this Court and of the District Court are correct. Likewise no exception is taken to our recital of the proceedings in the District Court.

However, appellee asserts that our statement of the case (pp. 4-9 of our opening brief) "is not, in all respects, accurate or complete and is argumentative" (p. 2). No inaccuracy, omission nor argument is cited to support the general assertion. Nor have we found any. We believe the statement of the facts in our opening brief is fair and accurate.

Appellee, of course, may make his own summary of facts and he has done so. We find no specific conflict between ours and his. Aside from the differences in language, appellee seems to have given his version of the facts in order to quote selected parts of the contract, the amended complaint, and the District Court's "Memorandum and Order" and to emphasize, by italics, some of the words in those selections. At best, this treatment of the facts is a form of argument. Emphasis placed on language taken out of its entire context means very little.

Turning to appellee's direct argument, which is summarized at pages 11-13 of his brief, we find he argues four points, viz.: (1) "there is no uncertainty or ambiguity in the contract as written"; (2) the contract cannot be reformed because appellants do not allege an agreement preceding the writing to which the writing "should or could be reformed"; (3) the complaint for reformation is barred by the three-year statute of limitations because suit was not filed within three years from the "execution of the contract" and, they say, appellants do not explain why they could not, with reasonable diligence, have discovered their mistake within three years "from the making of the contract"; and (4) the action of the District Court "was neither irregular nor in any way prejudicial to appellants." Each of these points, except (4) above, was contained in the "Memorandum and Order" of the District Court and all four are answered in our opening brief. We will examine briefly appellee's reply to our opening brief.

ARGUMENT.

THE AMENDED COMPLAINT STATES A CLAIM FOR RELIEF UPON THE CONTRACT AS WRITTEN.

The argument contained on pages 11 to 28 of our opening brief as to the error of the District Court in holding appellants have failed to state a claim based on the contract as written is treated at pages 14 to 24 of appellee's brief.

At pages 13 to 16 of our opening brief we stated, with supporting authorities, the rules of construction applicable to appellants' claim on contract. Appellee (at p. 16) answers, without citing any authority, only by asserting that the language of the contract "as a matter of law" does not support appellants' claim as to its meaning. If, by this assertion, appellee is saying that the phrase "in the property listed in Schedule A" means, *"as a matter of law"* "in all the property listed in Schedule A" and cannot mean "in all or in any of the property listed in Schedule A", he is clearly in error. At pages 26 to 28 of appellants' opening brief it is shown that the words "the" and "the property" have no exact meaning, citing:

Anundsen v. Standard Printing Co. (Iowa, 1905) 105 N. W. 424;

Howell v. State (Ga., 1927) 138 S. E. 206, 210;

Craig v. Boyes (1932) 123 C. A. 592, 596;

Noyes v. Children's Aid Society, 70 N.Y. 481, 484;

City of Oakland v. Hogan (1940) 41 C. A. 2d 333.

Appellee has made no attempt to answer this part of our brief.

The above cited cases clearly demonstrate that "in the property" has no precise or exact meaning "as a matter of law", or otherwise, and that the court below was wrong in construing the phrase to mean in all the property and in denying appellants an opportunity to prove their claim as to its meaning in this contract.

Appellee concedes (p. 16) that this Court is not bound by the District Court's construction of the contract. Apparently he also concedes, by silent acquiescence, appellants' contention:

> "This Honorable Court is called upon to examine the allegations of the amended complaint and all provisions of the written contract incorporated therein, and unless this Court is convinced from its own independent consideration thereof that appellants 'would be entitled to no relief under any state of facts which could be proved in support of the claim', it must reverse the judgment herein" (opening brief pp. 16, 17).

To the codified rules that the contract must be construed against appellee who prepared it and is the promisor, appellee answers (pp. 16, 17) only that "there is no room for construction" "because the questioned clause of the contract is not uncertain, ambiguous or subject to two constructions". Appellee hopes to convince this Court that the contract is "clear, certain and unambiguous" by constant repetition of the statement that such is the fact. Constant

repetition of a statement is a technique employed in advertising and propaganda as a means of convincing the reader that the statement is true. It is not a legal argument.

Appellee next notes (p. 17) appellants' assertion that the amended complaint alleges that the parties here have placed opposite interpretations upon the contract. He assumes quite correctly that appellants contend that the fact the parties have construed the language differently is a circumstance which a court will consider in reaching its own interpretation. But he says (p. 17), "Of course that is not the law", citing *Eaves v. Timm Aircraft Corp.* (1951) 107 C. A. 2d 367. We submit that appellee is mistaken as to the law and the *Eaves* case, supra, does not support his theory.

In the recent case of *MacIntyre v. Angel* (1952, hearing by Supreme Court denied April 24, 1952) 109 C. A. 2d 425, an agreement jointly signed and purporting, by the terms "we agree" and "we will make every effort", etc., to assume joint undertakings, was not intended as a joint and several undertaking but as separate and severable undertakings. The court says at page 429:

> "Thus it appears that the parties are in disagreement as to the meaning of the writing which they signed, as was the case in *Wachs v. Wachs,* 11 Cal. 2d 322, 325 (70 P. 2d 1085), *Woodbine v. Van Horn,* 29 Cal. 2d 95, 104 (173 P. 2d 17), and *Union Oil Co. v. Union Sugar Co.,* 31 Cal. 2d 300, 305 (188 P. 2d 470). As in each of those cases, the writing seems susceptible to either of the in-

terpretations respectively urged by the parties. We cannot to a certainty and with sureness, by a mere reading of the document, determine which is the correct interpretation."

In *Hanney v. Franklin Fire Ins. Co.* (1944, C.C.A. 9) 142 F. 2d 864, this Court took note of the opposite interpretations of the parties.

Indeed it seems fair to say that a court looks in the first instance to the construction placed upon the contract by the parties themselves. See *Woodbine v. Van Horn,* supra.

The *Eaves* case, supra, arose from a written contract whereby defendant agreed to pay for plaintiff's services in obtaining an "affiliation" between defendant and another corporation. No affiliation occurred, but defendant subsequently leased one of its plants. The court observed (p. 370) that, the cause of action "asserts the claim that while the writing said one thing it was represented by defendant to mean something quite different." The case holds that affiliation did not, and could not be interpreted to cover a lease.

Obviously, a contract covering Blackacre cannot be interpreted to cover Whiteacre, but a contract covering "the property" may be found to cover either or both, and the fact that the parties have interpreted it differently is a part of the evidence which a court will consider before deciding "what the parties meant by what they said".

As his answer to our point that operation of the price escalator clause, as appellee wrote it, depended

upon a future voluntary act by appellee and the construction of the District Court rendered it absurd because appellee is thereby given the option to escape its own promise, appellee says (pp. 17, 18) "any such evasive subterfuge would be squarely met by the rules of 'diminimus' (sic) and of 'substantial performance' ". This answer begs the question. We stated fundamental rules of interpretation "* * * does not involve an absurdity", *Civil Code,* section 1638; "interpretation must be reasonable," *Civil Code,* section 3541. Another important rule of interpretation favors a construction of a contract as bilateral, affording protection to both parties, rather than unilateral. *Woodbine v. Van Horn,* supra.

Appellee says, in effect, these rules are not pertinent here because, if the contingency occurred, appellants could recover on the contract because the rules of *de mininis* and substantial performance come into play. At what point would they come into play? And why should general rules of interpretation not be applied because some other rule of law may be invoked?

At page 19 of our opening brief we pointed out that even if the words "in the property" were "clear and explicit", as the District Court contends, this Court's construction of them must be rejected because it involves an absurdity, citing section 1638 of the *Civil Code of California.* Appellee has ignored this rule. But in *MacIntyre v. Angel,* supra, the court applied the rule and at p. 429 of 109 C. A. 2d, stated it as follows:

> " 'But this (referring to section 1638, *Civil Code) does not mean that a portion only of a written instrument, although it is clear and explicit, may be selected as furnishing conclusive evidence of the intention of the parties.* Section 1641 of the Civil Code embraces the true rule in providing that the whole of a contract is to be taken together, so as to give effect to every part, if reasonably practical, each clause helping to interpret the other.' (*Universal Sales Corp. v. California Etc. Mfg. Co.,* 20 Cal. 2d 751, 760, [128 P. 2d 665]." (Emphasis ours).

Appellee says next (p. 18) "But if appellants were allowed to rewrite the phrase 'in the property listed in schedule A' " "then they would thereby inject real uncertainty into the contract" as to how much appellee owes! The suit on contract is not an attempt to "rewrite" it, only to construe it. And we are injecting no new uncertainty into the contract. But even if a proper construction of one phrase in the contract raises an issue as to the meaning of another, that is not a valid excuse for denying it proper construction. The appellee cannot escape liability because the litigants may disagree as to how much he owes.

Appellee concedes (p. 18) of course that the contract must be construed as a whole. He then cites three references in section 10 of the contract to "the John F. Ducey interest" arguing that such references are consistent with his interpretation of the contract and inconsistent with appellants' interpretation of it. These references obviously are to "the 498.8/1360 fractional interest of John F. Ducey". Appellee does not explain

and we fail to see how they clarify or help the Court to determine whether "in the property" means "in *all* the property" or "in *any* of the property".

On the other hand, appellants cited, at pages 19 to 21 of their opening brief, other provisions of the contract which support their interpretation of it. Appellee has made no attempt to answer. In other words, while contending the contract is clear appellee ignores, and must be deemed unable or unwilling to answer, other cited provisions of the contract which are inconsistent with his claim as to its meaning.

Appellee refers (pp. 11, 12, 19, 24, 25) to a part of an allegation in paragraph XI of the complaint (R. 39) that "The contingency of the purchase by defendant corporation of the fractional interest of John F. Ducey in a part but less than all of said lands was not discussed during the negotiations between plaintiffs and defendant corporation, * * *", omitting in each instance the gist of the allegation contained in the same sentence. He argues in effect that the above quoted part is "contrary to" and "virtually" a concession that "in the property" means in *all* the property.

We see no contradiction or inconsistency between a lack of discussion during negotiations and appellants' understanding of the contract which appellee subsequently prepared and submitted, but even if it were wholly inconsistent, appellee's argument is unsound. Paragraph XI states appellants' claim for reformation, not their claim upon the contract, and Rule 8(c)

of the *Federal Rules of Civil Procedure* expressly authorizes a party to state "in one count", "as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both."

Appellee can take no possible comfort from what he thinks is an inconsistency between our claim on contract and part of an allegation in our alternative claim for reformation of the contract.

At page 19 appellee lists some of the cases we have cited dealing with patent and latent ambiguity, and dismisses them with the observation that "each and every one of those cases involved an ambiguity or uncertainty," whereas the contract here is "clear and unambiguous". He follows up (pp. 21-23) by restating quotations and authorities cited by the court below (Tr. pp. 62-64). There is little to be gained by listing cases which admitted extrinsic evidence because the writing was ambiguous and those which held the writing to be clear on its face. The issue is presented in many cases. As noted in *Body-Steffner Co. v. Flotill Products* (1944) 63 C. A. 2d 555, 562, there is considerable opinion that parol evidence should always be admissible, regardless of ambiguity, to show "the sense in which the contracting parties used and understood the language of their written contracts". What is significant is the fact that wherever there is possible doubt as to meaning the California courts avoid the harsh rule of exclusion which was invoked here by declaring the writing is not clear and thereby admitting extrinsic evidence as to its meaning.

See:

MacIntyre v. Angel, supra;
Body-Steffner Co. v. Flotill Products, supra;
Wachs v. Wachs, supra;
Universal Sales Corp. v. Cal. etc. Mfg. Co., supra;
Woodbine v. Van Horn, supra;
Union Oil Co. v. Union Sugar Co., supra.

Appellee says (p. 23) that "it is too obvious for debate that the appellants' premise is erroneous"; the District Court did not *add* the word "all" to the clause; "he merely defined what it means in other words". Well, let us look at the record. He dismissed the complaint on the ground "that there is no ambiguity in the contract" (Tr. p. 76); from all that appears he believed the contract was clear on the basis of the clause "in the property listed in schedule A"; and what he said was,

> "Generally speaking, we may say that 'the property', as used in the present contract, means 'all the property' ". (Tr. p. 63.)

Thus the District Court "read something into a contract to make it clear"—the word *"all"*—thereby demonstrating its ambiguity (*Union Oil Co. v. Union Sugar Co.* (1948) 31 C. 2d 300, 306) and having done so excluded "extrinsic evidence on the ground that so construed no ambiguity exists"—a practice which is condemned as error in the *Union Oil Co., Body-Steffner Co.* and *MacIntyre* cases, supra.

THE AMENDED COMPLAINT STATES A CLAIM FOR RELIEF BY WAY OF REFORMATION.

It is unnecessary and not the function of this brief to restate the argument nor recite the authorities contained in our opening brief. The basic issue which is argued there, with cited authority, is the error of the District Court in failing to note the difference between "a mutual mistake of the parties" and "a mistake of one party, which the other at the time knew or suspected," and therefore holding that in pleading a claim of mistake of the latter type it is necessary to allege "a definite agreement that preexisted the instrument sought to be corrected" (Tr. p. 69).

Appellee, in his brief, does not come to grips with this issue. His argument follows that of the Court below that it is "well settled" in California that before a contract can be reformed on the ground of fraud or mistake the plaintiff must plead and prove "a definite agreement that preexisted the instrument." Appellee has added the assertion, without any supporting authority, that this suggested rule applies to "mistake of any kind, including unilateral mistake or mistake of one party" (p. 26). The only authorities cited by either appellee or the District Court are the cases of *Auerback v. Healy* (1916) 174 C. 60, and *Bailard v. Marden* (1951) 36 C. 2d 703, both of which are cited and distinguished at pages 33-35 of our opening brief.

In brief, the case here is this: appellee, in California prepared a purchase agreement and sent it to appellants in New York who signed and returned it. Ap-

pellee then signed. Appellants at the time understood and believed, and appellee knew they so understood and believed, that the price escalator clause meant that in the event appellee should acquire Ducey's interest in all or any of the property (within the fixed period) at a higher price than $75 per acre, appellants would receive the same price per acre as Ducey.

There was no "definite agreement that preexisted the instrument". Appellee contends, and the court below held, that the writing cannot be reformed. Our code (C. C. Sec. 3399) does not say so. Neither does any case we have been able to find.

Appellee argues (p. 26) that you cannot reform a written contract to make it say something the parties never agreed to, for that would be to remake, not reform, a contract. Such was the contention in *Eagle Indemnity Co. v. Industrial Acc. Comm.* (1949) 92 C. A. 2d 222, and the court answered that reformation for "a mistake of one party, which the other * * * knew or suspected" did not "create a new or different contract" because "the contract which was intended by the party acting under unilateral mistake known or suspected by the other, is, as a matter of law, the contract of the parties." (See quotation at p. 32 of our opening brief.)

The above interpretation by the California Court of section 3399 of the California Civil Code is "admittedly controlling" in this Court. *Black v. Richfield Oil Corp.* (C.A. 9, 1945) 146 F. 2d 801, 804. Applied here, it means appellants have stated a claim which,

if true, "is, as a matter of law, the contract of the parties." This shows the error of the District Court in dismissing the claim for the stated reason: "Nowhere in the amended complaint now before this Court is there any suggestion of any 'preexisting agreement' to which the sought-for reformed instrument should conform." (Tr. p. 71.) If the rule quoted by the District Court from the *Auerback* and *Bailard* cases, supra, that a "preexisting agreement" or "complete mutual understanding" could be applied to a claim for a mistake of one party which the other at the time knew or suspected"—and no California case has said that it does—then, even so, *Eagle Indemnity,* supra, says the claim stated in our amended complaint "is, as a matter of law, the contract of the parties". Thus an agreement is stated "to which the sought-for reformed instrument should conform."

THE ACTION FOR REFORMATION IS NOT BARRED BY LIMITATIONS.

Appellee has adopted (pp. 28-32) the reasoning contained in the opinion of the District Court (Tr. pp. 71-76) that the claim for relief by way of reformation is barred by the three year statute of limitations, *California Code of Civil Procedure,* Section 338 (4), as assertedly revealed on the face of the amended complaint. The gist of this argument is that the amended complaint does not allege facts excusing appellants' failure to discover the purchase by appellee of the

John F. Ducey interest (which occurred December 9, 1947) before February, 1949 (Tr. pp. 73, 74; Appellee's Brief, pp. 29-31) and that appellee's failure to give appellants' notice of said purchase, in accordance with the requirements of the notice provision contained in paragraph 10 (B) of the contract is no excuse because appellee was only required to give notice in the event it purchased the Ducey interest "in all of the property" (Tr. p. 75; Appellee's Brief, p. 31).

The notice provision of the contract was obviously inserted for the protection of appellants, who lived in New York and who had no ready facility whereby to inform themselves of a transaction involving the purchase and sale of subject California timberland between John F. Ducey, a resident of Michigan, and appellee, a Delaware corporation having offices in Missouri and California, in the absence of written notice thereof. As noted, supra, and in our opening brief (p. 40), the District Court construed the notice provision against appellants by reading into paragraph 10A the word "all", the reading of which into the contract is a practice condemned as error in the *Body-Steffner, Union Oil* and *MacIntyre* cases, supra.

Even if we admitted, for purposes of argument, that any such strained reasoning as advocated by appellee was valid in law, we submit it is not valid in equity,—and the action for reformation is an equitable action—because of the operation of the equitable doctrine of estoppel. This doctrine prevents a defendant from raising the defense of the statute of limitations where

he has previously, by deception or any violation of duty toward plaintiff, caused plaintiff to permit the statutory period to lapse. The reason for the rule is that in such cases the defendant has wrongfully obtained an advantage which the court will not allow him to hold.

56 *Corpus Juris Secundum,* pp. 962-964;
Verdugo Canon Water Co. v. Verdugo (1908) 152 Cal. 655, 681-684;
Miles v. Bank of America N.T. & S.A. (1936) 17 Cal. App. 2d 389, 397-398.

We discussed this point in our opening brief (pp. 38-39). Appellee has not answered it. We believe it is unanswerable.

THE DISTRICT COURT ERRED IN DENYING APPELLANTS AN OPPORTUNITY TO PROVE THEIR CLAIMS.

Appellee argues (p. 32) that the action of the District Court "was neither irregular nor in any way prejudicial to appellants." The contention seems to be that the amended complaint shows that appellants have no claim either on the contract or for reformation of contract, and therefore the dismissal of the action after it was at issue and before trial was not prejudicial to appellants. We see no need to answer further an argument which is based on an erroneous premise. We feel we have demonstrated that appellants do have a claim on contract, and in the alternative, a claim for reformation. A denial of the oppor-

tunity to prove their claims is certainly prejudicial to them.

Appellee contends (p. 33) that there was no occasion for pretrial conference, and that a motion for summary judgment was not called for because appellee was not contending that the depositions show there was no definite issue as to any material fact, but was contending simply that the amended complaint failed to state a claim.

Well, the motion to dismiss was filed in January. In March the court deferred a ruling on it "until the trial". In April appellee filed its answer. Thereafter depositions of the parties were taken and the case was set for trial. In September, the court, *sua sponte,* filed a "memorandum and order" dismissing the amended complaint and rendering judgment for appellee. No ruling on the merits was called for at the time of judgment; neither party was "contending" in the sense that a ruling was then in order; and the depositions, while on file, had not been put before the Court. No doubt appellee was as surprised as the appellants were by the unexpected ruling (and far more pleased!). The point is that appellants assumed that the court would not rule further on the motion to dismiss "until the trial" when the evidence and depositions would be before it, and they had every right to so assume in the absence of any pretrial conference or motion under Rule 56.

CONCLUSION.

We feel that the foregoing, together with our opening brief, demonstrates to a certainty that the judgment herein must be reversed and the appellants permitted to have their day in court.

Dated, San Francisco, California,
May 1, 1953.

Respectfully submitted,
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